LEMBAGA KUMPULAN WANG SIMPANAN PEKERJA A

v.

SUASA KRISTAL (M) BHD & ORS

HIGH COURT MALAYA, PENANG B
BALIA YUSOF WAHI J
[CIVIL SUIT NO: 22-100-2005 (MT-4)]
6 JANUARY 2009

CIVIL PROCEDURE: *Setting aside - Application for - Rules of the High Court 1980, O. 18 r. 19 - Application by third and fourth defendants to set aside plaintiff's action of suing defendants for failing to remit contributions towards employees - Employees Provident Fund Act 1991, s. 45 - Whether the act of naming only four out of six of first defendant's directors amount to abuse of court's process - Whether third and fourth defendants being nominee directors could avoid liability under s. 46 of the Employees Provident Fund Act 1991* C D

This was an appeal against the decision of the learned deputy registrar dismissing the third and fourth defendants' application to set aside the plaintiff's action under O. 18 r. 19(1) Rules of the High Court 1980 on the grounds that it was frivolous, vexatious and prejudiced. The plaintiff sued the first defendant as the employer, and the second to fifth defendants as directors of the first defendant. The plaintiff contended that the first defendant was an employer pursuant to the definition as contained in s. 2 of the Employees Provident Fund Act 1991 ('the Act') and was therefore statutorily bound to contribute monthly towards its employees. Pursuant to ss. 43 and 45 of the Act, the first defendant was duty bound to remit to the plaintiff its contribution and that of the employees within the time stipulated under r. 3 of the Rules of Employees Provident Fund 1991. It was the plaintiff's case that the first defendant had failed to remit the said contributions amounting to RM376,105. The second to fifth defendants being directors were jointly and severally sued pursuant to s. 46 of the Act for the contribution remaining unpaid by the first defendant amounting to the same figure. The first defendant had six directors but two were not named as defendants in this action. The plaintiff's failure to include them as defendants in this action was the crux of the matter in this application. The issues raised by the third and fourth defendants were (i) whether the act of naming only four out of six of the first defendant's directors amount to an abuse of the court's process and/or contrary to E F G H I

A s. 46 of the Act and (ii) whether the third and fourth defendants being nominee directors could avoid liability under s. 46 of the Act.

Held (dismissing the appeal):

B **(1)** Liability under s. 46 of the Act is both jointly and severally. The words 'jointly and severally' are defined as 'persons who are jointly and severally bound to render themselves liable not only to a joint action against them, but also to separate actions against them individually.' It was open to the plaintiff C to proceed against the defendant either against all of them in one action or separately against them in separate actions *(Alliance Bank Malaysia Bhd v. Mukhriz Mahathir & Anor)*. There was nothing wrong with the plaintiff's action against the defendants in the present case and the failure to name the D other two directors of the first defendant did not constitute an abuse of the court's process or was in any way frivolous or vexatious. The discretion to sue one, two or any of the directors of the first defendant lay on the plaintiff. The appeal on this ground must fail. (paras 13, 14 & 15)

E **(2)** Section 46 of the Act does not make any distinction between nominee, active or non-active director and neither is the word director defined under the Act. In law, there is no difference in the liabilities of these directors. The fact that judgment in F default of appearance had been entered against the first, second and fifth defendant did not prevent the plaintiff from continuing this action against the third and fourth defendants. Liability being joint and severally under this section afforded the plaintiff with a cause of action against the remaining G defendants. (paras 17 & 18)

Case(s) referred to:

Affin Bank Bhd v. Joseph Thambirajah [2004] 6 CLJ 201 HC ***(refd)***

Alliance Bank Malaysia Bhd v. Mukhriz Mahathir & Anor [2006] 2 CLJ 723 HC ***(refd)***

H *Bandar Builders Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd [1993] 3 MLJ 36* ***(refd)***

Hagemeyer Trading Co (M) Sdn Bhd v. Gibson Trading Co [1978] 2 MLJ 101 ***(refd)***

Lembaga Kumpulan Wang Simpanan Pekerja v. Adorna Rmit Sdn Bhd I *(Civil Suit No: 22-632-2001) (Unreported)* ***(refd)***

McKay & Anor v. Essex Area Health Authority & Anor [1982] 2 All ER 771 ***(refd)***

Pengiran Othman Shah Pengiran Mohd Yusoff & Anor v. Karambunai Resort Sdn Bhd & Ors (formerly known as Lipkland (Sabah) Sdn Bhd) & Ors [1996] 1 CLJ 257 CA ***(refd)***

Legilstion referred to:
Employees Provident Fund Act 1991, ss. 2, 43, 45(3), 46
Rules of the High Court 1980, O. 18 r. 19(1)

For the plaintiff/respondent - Taryna Lim Luen On; M/s Rusmin Ida & Tayna
For the 3rd & 4th defendants/appellants - Lim Boon Beng; M/s Ooi Lee & Co

Reported by Suhainah Wahiduddin

JUDGMENT

Balia Yusof Wahi J:

[1] This is an appeal against the decision of the learned deputy registrar, dismissing the 3rd and 4th defendants' application to set aside the plaintiff's action under O. 18 r. 19(1) Rules of the High Court 1980 on the ground of (a) frivolous, vexatious and (b) prejudice, embarrass or delay the fair trial of the action.

[2] Altogether seven affidavits were filed between the parties, four for the defendants and three for the plaintiff.

Facts

[3] The plaintiff sued the 1st defendant as the employer, and the 2nd to 5th defendants as directors of the 1st defendant. The plaintiff contended that the 1st defendant was an employer pursuant to the definition as contained in s. 2 of the Employees Provident Fund Act 1991 ('the Act') and was therefore statutorily bound to contribute monthly towards its employees. Pursuant to ss. 43 and 45 of the Act, the 1st defendant was duty bound to remit to the plaintiff its contribution and that of the employees within the time stipulated under r. 3 of the Employees Provident Fund Act 1991. The stipulation was that such remittance must be made to the plaintiff not later than 21 days from the last date of each month. It was the plaintiff's case that the 1st defendant had failed to remit the said contributions from August 1998 to February 1999, April 1999, June 1999 to July 2001, September 2000, December 2000, May 2001, June 2001, August 2001 to

September 2001 and December 2001 amounting to RM376,105 details of which had been particularized in the plaintiff's amended statement of claim (encl. 24).

[4] Section 45(3) of the Act also stipulates that in the event the employer failing to pay the due contribution within the time stipulated, the said employer must pay an additional contribution a sum equivalent to the dividend paid out by the plaintiff for the year concerned.

[5] The plaintiff had pleaded that the dividend it paid for the year of 1998 was 6.7% p.a, 6.84% for 1999, 6.00% p.a, for 2000, 5.00% p.a. for 2001, 4.25% p.a. for 2002, 4.50% p.a for 2003 and 2004.

[6] The 2nd to 5th defendants being directors of the 1st defendant are jointly and severally sued pursuant to s. 46 of the Act for the contribution remaining unpaid by the 1st defendant amounting to the same figure.

[7] The 1st defendant has six directors but two were not named as defendants in this action, namely Dr. Basir Ahmad bin Pier Mohd and Foong Yat Wah. The plaintiff's failure to include them as defendants in this action has been the crux of the matter in this application.

Issues

[8] The issues raised by the 3rd and 4th defendants in this appeal are twofold:

a. whether the act of naming only four out of six of the 1st defendant's directors amount to an abuse of the court's process and/or contrary to s. 46 of the Act.

b. Whether the 3rd and 4th defendants being nominee directors could avoid liability under s. 46 of the Act.

The Law

[9] The principles upon which the court acts in exercising its power under any of the four limbs of O. 18 r. 19(1) of the Rules of the High Court 1980 are well settled. It is only in plain and obvious cases that recourse should be had to the summary process under this rule and the summary procedure can only be adopted when it can clearly be seen that a claim or answer is on

the face of it 'obviously unsustainable'. It cannot be exercised by a minute examination of the documents and facts of the case in order to see whether the party has a cause of action or a defence. (See: *Bandar Builders Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36).

[10] In *Pengiran Othman Shah bin Pengiran Mohd Yusoff & Anor v. Karambunai Resort Sdn Bhd (formerly known as Lipkland (Sabah) Sdn Bhd) & Ors* [1996] 1 CLJ 257 where in allowing the defendant's application to strike out the plaintiffs' action under O. 18 r. 19 of the RHC, Siti Norma Yaacob JCA stated at p. 265, that:

> the discretionary power to dismiss an action summarily under O. 18 r. 19 and under the inherent jurisdiction of the court is a drastic power which should only be exercised in plain and obvious cases, as the effect of the exercise of such power is to shut out the plaintiff altogether from pursuing his claim. (See: *Tractors (M) Bhd v. Tio Chee Hing* [1975] 2 MLJ 1) Whether a case is plain or obvious does not depend upon the length of time it takes to argue the case, but that when the case is argued on the affidavit evidence available, it becomes plain and obvious that the case has no chance of success. (See: *McKay & Anor v. Essex Area Health Authority & Anor* [1982] 2 QB 1166; [1982] 2 All ER 771; [1982] 2 WLR 890.

Stephenson LJ in *McKay & Anor v. Essex Area Health Authority & Anor* [1982] 2 All ER 771 at p. 778 sated that:

> In my judgment the power is a discretionary power. The word 'may' in Order 18 r. 19(1) does not mean 'must'. But a defendant has a *prima facie* right to be relieved of having to meet a claim which discloses no reasonable cause of action, and if he can succeed in showing that a claim must fail, he ought not to be denied that relief simply because he still has not met other claims by the plaintiff or unless there are strong reasons for allowing the bad claim to go to trial.

Whether The Act Of Naming Only Four Out Of Six Of The 1st Defendants' Directors Amount To An Abuse Of Court's Process And/Or Contrary To s. 46 Of The Act?

[11] Section 46 of the Act provides as follows:

46. Joint and several liability of directors, etc.

(1) Where any contributions remaining unpaid by a company, a firm or an association of persons, then notwithstanding anything to the contrary in this Act or any other written

A law, the directors of such company including any persons who were directors of such company during such period in which contributions were liable to be paid, or the partners of such firm, including any persons who were partner of such firm during such period in which
B contributions were liable to be paid, or the office-bearers of such association of persons, including any persons who were office-bearers of such association during such period in which contributions were liable to be paid, as the case may be, shall together with the company, firm or
C association of persons liable to pay the said contributions, be jointly and severally liable for the contributions due and payable to the fund.

(2) ...

D **[12]** Reading the plain words of the abovesaid section it leaves no room for doubt that liability under the said provision is both jointly and severally. The plaintiff has also specifically pleaded in its statement of claim that the defendants are sued jointly and severally.
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[13] *Black Law Dictionary* (7th edn) defines the term joint and several liability as a liability that may be apportioned either among two or more parties or to only one or a few select members of the group, at the adversary's discretion. Thus, each liable party is
F individually responsible for the entire obligation, but a paying party may have a right of contribution and indemnity from non-paying parties.

[14] The words 'jointly and severally' are defined as 'persons who
G are jointly and severally bound to render themselves liable not only to a joint action against them, but also to a separate actions against them individually'. It is open to the plaintiff to proceed against the defendant either against all of them in one action or separately against them in separate actions. (See: *Alliance Bank*
H *Malaysia Bhd v. Mukhriz Mahathir & Anor* [2006] 2 CLJ 723).

[15] There is nothing wrong with the plaintiff's action against the defendants in the present case and the failure to name the other two directors of the 1st defendant does not constitute an abuse
I of the court's process or in anyway frivolous or vexatious. The discretion to sue one, two or any of the directors of the 1st

defendant lies on the plaintiff. To suggest that s. 46 of the Act imposes an obligation on the plaintiff to sue all the directors in one action amounts to importing words into the section and goes against the fundamental rules of interpretation of statutes. The appeal on this ground must fail.

Whether The 3rd And 4th Defendants Being Nominee Directors Could Avoid Liability Under s. 46 Of The Act

[16] It is the 3rd and 4th defendants' contention that they are merely nominees for the company Pelangi Hebat Sdn Bhd. The company holds 1,897,130 shares in the 1st defendant. Since they are merely nominee directors, they should not be made a party to this action.

[17] Section 46 the Act does not make any distinction between nominee, active or non-active director and neither is the word director defined under the Act. In law, there is no difference in the liabilities of these directors.

[18] The fact that judgment in default of appearance has been entered against the 1st, 2nd and 5th defendant does not prevent the plaintiff from continuing this action against the 3rd and 4th defendants. Liability being jointly and severally under this section affords the plaintiff with a cause of action against the remaining defendants. (See: *Affin Bank Bhd v. Joseph Thambirajah* [2004] 6 CLJ 201, *Hagemeyer Trading Co (M) Sdn Bhd v. Gibson Trading Co* [1978] 2 MLJ 101, *Lembaga Kumpulan Wang Simpanan Pekerja v. Adorna Rmit Sdn Bhd* (unreported, Penang High Court Civil Suit No: 22-632-2001).

Conclusion

[19] The appeal by the 3rd and 4th defendants to set aside the action is without merits. The appeal is hereby dismissed with costs and the deputy registrar's decision is affirmed.